IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 822 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMESH RAMCHARAN AGRAVAL & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR JM PANCHAL for Appellant(s) : 1 - 2.
MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 07/09/2007

ORAL JUDGMENT

Present appeal is preferred by the appellants (original accused Nos.3 and 4) against the judgment and order of conviction and sentence passed in Special Criminal Case No.150 of 1992 on 29th June,

1993 whereby the present appellants have been convicted for contravening of Clause – IV and XV of the Gujarat Essential Articles (Licencing, Control and Stock Declaration) Order 1981 and thereby committed offence punishable under Section 3 read with Section 7 of the Essential Commodities Act.

1.1 In all four accused persons were charge-sheeted and tried. However at the conclusion of the trial, the learned trial Judge has acquitted the original accused Nos.1 and 2. Whereas, the original accused Nos.3 and 4, that is, present appellants have been convicted as aforesaid and accused No.3 has been sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs.200/-, in default thereof, to undergo seven days rigorous imprisonment and accused No.4 has been sentenced to undergo rigorous imprisonment for three months.

2. To appreciate the submissions made by Mr.K.J.Panchal, learned Counsel for the appellants firstly the Court would like to state the basic facts of the prosecution that were placed before the

learned trial Judge.

2.1 That on 29/01/2002 at about 8:15 hours, Mr.R.H.Chaudhari, P.S.I., Rasulmiya, Head Constable, Dhanjibhai, Police Constable of surveillance squad of Shaherkotda Police Station were on petrolling duty near Anil Road, Sonia Ceramic Road, Ahmedabad. It is the case of prosecution that one loading auto-rickshaw having covered body bearing Registration No.GTH-7636 came from the direction of Vijay Mills. It is alleged that the rickshaw was made to stop and at that time accused No.3 was driving the rickshaw and he had made an attempt to run away. However, he was caught hold of by the Police Constable, Dhanjibhai. It is further alleged that accused No.4 was found sitting in the cabin of the loading rickshaw. It is alleged that 1000 liters of kerosene was found in five iron barrels. It is alleged that the accused persons could not give any satisfactory explanation for possession of stock of kerosene and therefore Panch Witnesses were called and samples were collected by the Police and Panchnama was drawn. It is further alleged that two sample bottles, five

barrels of kerosene and auto-rickshaw were seized under Section 102 of the Cr.P.C. and accused Nos.3 and 4 were arrested.

2.2 It is the case of prosecution that on investigation it was found that the stock of kerosene was of original accused No.1 and loading rickshaw was of accused No.2. The accused No.1 was carrying on business of selling kerosene at Potalia Cross Road, Ahmedabad and stock was loaded in the rickshaw near Potalia cross-road. It is alleged that the accused No.2 was leading the rickshaw by following one scooter which was driven by the accused No.1 and when the rickshaw was stopped, the accused No.1 had run away on the scooter. It is alleged that the stock of kerosene was to be delivered to one Godharmal Sindhi at Saijpur Rower. Thereafter, Mr.Chaudhari handed over the stock of kerosene, auto-rickshaw and custody of accused persons to Shaherkotda Police Station alongwith report under Section 157 of the Code of Criminal Procedure. By forwarding note written by Mr.Chaudhari, the Civil Supply Department was informed. It is alleged that the inspecting staff of

Civil Supply Department went to the shop of accused No.1 where accused No.2 and clerk were found present. Statement of accused No.2 was recorded and it is further alleged that the report was also made to Superior Officer. On the basis of the report, the offence was registered and after conducting the investigation charge-sheet came to be filed.

3. It is accepted principles of law that the case of prosecution should stand on its own leg and substratum of the story should remain intact. The charge against the accused persons was that they were transporting stock of kerosene illegally that was being sold in black-market and the said stock was to be delivered at a particular place. So, the name of recipients was also disclosed during the course of investigation. This fact may have come to the notice of the Investigating Officer on the strength of the clue given by the accused but on plain reading of the judgment vis-a-vis the evidence recorded by the learned trial Judge during the trial, it is submitted by Mr.Panchal that while linking the accused with the crime the learned trial Judge has committed a grave

error on reading some inadmissible evidence and has also not correctly applied the principles of appreciation of evidence. While developing this argument, Mr.Panchal has drawn attention of the Court that the learned trial Judge has placed reliance on confessional statement recorded by the Officer of the Civil Supply Department of Government of Gujarat but has ignored one fact that at the time when the statement was recorded the accused was in police custody and the same was recorded even before they were produced first time before the learned Magistrate. It is the case of prosecution that loading rickshaw carrying five barrels of kerosene was intercepted by Police and it is also alleged that both the accused persons were taken by Police alongwith stock of the kerosene to the concerned Police Station and they were interrogated and thereafter the Officers of the Civil Supply Department was informed by the Police itself and when accused were in custody of Police, statement of any of the accused recorded by the Officer of Civil Supply Department, the same would consider in evidence and could have been exhibited, that is,

statement of accused No.3 (Exh.78). Statement of accused No.4 has not been received in evidence and the same has not been exhibited. According to Mr.Panchal, an unexhibited document, viz., statement of accused No.4 ought not to have been considered or read over by the learned trial Judge, even though the same has been considered while linking the accused with the crime.

4. One another point advanced by Mr.Panchal is that as per case of prosecution both the accused persons-present appellants were practically carrier and the persons doing work though the real culprits who was intending to sell the stock of kerosene in black market. The accused No.3 was brother of accused No.1. It is also the case of prosecution that accused No.3 was serving as employee in the shop run by accused No.1. For the sake of argument if it is accepted that accused No.3 was present and was actively participating in transporting the stock of kerosene even then no *mens rea* can be attached with his conduct because ultimately he was supposed to deliver the stock as per orders of real owner of

kerosene. According to Mr.Panchal, the prosecution was supposed to prove that the stock was being transported with a view to sell in black market and to prove that charge there was an ample opportunity with prosecution to show that the stock of kerosene loaded from shop of accused No.1 or the same was the stock purchased by accused No.1. For that necessary register of accused No.1 as licence dealer could have been cross-checked and produced before the Court. In absence of such evidence it was not possible for the Court to say that even indirectly that the stock found with accused Nos.3 and 4 was being transported to sell the same in black market. They were neither traders nor the recipients of the stock. It is not even possible for this Court to observe that they had stored or accepted the stock, meaning thereby they were holding the stock. If the logic developed by the learned trial Judge is accepted then each person carrying essential commodity with him should hold licence. A person carrying goods in transit may not hold licence and same is not even legal requirement. Surprisingly, the Police has not perhaps interrogated or arrested the person to whom the stock was to be

delivered. Obviously, such a person could not have been cited as a witness by Police. It appears that the Police has targeted small persons in a particular manner so that the real culprits, that is, owner of vehicle and stock of kerosene, etc., may not have to face the serious consequences of the act which they were doing. The respondent-State has not preferred any acquittal appeal against the accused persons who have been acquitted by the learned trial Judge. So the finding arrived at by the learned trial Judge holding both the appellants guilty of the charge should be quashed and set aside.

5. As per case of prosecution the accused No.3 was driving the vehicle and accused No.4 was sitting in the loading rickshaw with stock of kerosene. So the learned trial Judge ought not to have said that these persons were found with excess stock of kerosene. They were the persons found with the stock of kerosene temporarily so that the said stock should reach at the given destination. There is nothing on record to show that accused No.1 was independently prosecuted even departmentally for siphoning of the

stock of kerosene sold to him by Civil Supply Department otherwise one witness examined from the Department could have disclosed this fact during his deposition before the Court. The reason to link the accused with the crime assigned by the learned trial Judge are materially different in nature in respect of substance of the charge framed and in such a situation the say of Mr.Panchal is that accused may be acquitted.

6. Ms.Pandit, learned A.P.P., in response of the query raised by this Court has fairly accepted that the learned trial Judge has read an un-exhibited document viz., the statement of accused No.4 while evaluating the evidence and this can said to be a material error in nature. In the same way the so-called confessional statement of accused No.3 was recorded by the Officer of the Civil Supply Department and same was recorded when the accused No.3 was in police custody. So it will be difficult for the Court to accept that the statement must have been given freely and without any pressure or threat of dire consequences. The confessional statement

recorded by the Officer of Civil Supply Department can consider as important piece of evidence, but if the said statement read, it will be difficult for the Court to say that the same is confessional statement. The statement simply shows that certain crucial facts were admitted by the accused No.3 and if the admission is capable to be considered as confession then the same can be considered as confessional. There is clear distinction between the admission and confession. Here the statement cannot be looked into as an admission or confession of the guilt, as the same was recorded in presence of Police. The statement of accused No.3 recorded by the Civil Supply Officer being inadmissible hit by Section 26 of the Indian Evidence Act and cannot be read in evidence.

7. It is also relevant to note at this stage that evidence led by prosecution has not succeeded to establish that the stock of kerosene intercepted and ultimately seized by the Police was of accused No.1 and to prove that the prosecution could have led sufficient, convincing and cogent documentary

evidence by seizing relevant documents. The rule of best evidence would apply and prosecution cannot suppress the best evidence if available. The negligence on the part of the Investigating Officer in collecting best evidence and producing it while prosecuting the accused would positively go against the prosecution and the same obviously shall have to be considered as material infirmity.

8. Having considered the rival submissions and the facts that have emerged from the evidence led by the prosecution, the Court is of the view that thee is sufficient force in the argument advanced by Mr.Panchal. Undisputedly, the loading auto-rickshaw was intercepted and stopped by the Police Officer and the Police Officer found that it carries the stock of kerosene. There is no reasons for him to ask for a licence or memo either from driver or labourer who was driving that vehicle. Normally, a prudent Officer would inquire that from where they were presiding and where the stock of kerosene was to be delivered. It is the say of the Officer that accused Nos.3 and 4 were not in position to give satisfactory answers and

the conduct of the accused Nos.3 and 4 ultimately had led him to take the auto-rickshaw alongwith the stock of kerosene. The Panchas have not supported the case of prosecution. So the Court obviously shall have to rely on the evidence of the Officer who had intercepted the rickshaw and interrogated the accused Nos.3 and 4, but it is clear that main allegation was against the accused No.1 being an authorized dealer holding the stock of kerosene more than permissible, failure to link the accused No.1 and 2 with the crime, adversely affects the allegations made against the accused Nos.3 and 4 automatically. Because the case from the beginning is that accused Nos.3 and 4 were instruments in the procedure of siphoning of stock and kerosene was in transit. So the presence of accused Nos.3 and 4 cannot be said to be the presence in the capacity of the holder of the stock. It appears that the learned trial Judge has considered one aspect that the presence of both the accused with the stock of kerosene is irrespectively established and when they have not satisfactorily convinced the Court that they were authorized to carry the stock with them they were charged for

violated the relevant clauses of the Control Order. The condition itself of the control order normally has to be complied with by the licence holder or the person violating the control order by unauthorizedly in the business contrary to the scheme of the control order. The status of these two persons at the most was of an abetor and the wrong that was being done by the original owner of the kerosene or the person to whom the stock was to be delivered. When the main accused, that is, accused No.1 has been acquitted how the person who apparently working even as per the case of prosecution for accused No.1 could have been held responsible for the offence punishable under the Essential Commodities Act. There is no evidence of *mens rea* against the accused Nos.3 and 4. True it is that in certain cases, the *mens rea* can be inferred or presumed but the manner in which the accused Nos.3 and 4 have been linked with the crime, it is not possible to infer *mens rea* in the mind of the accused Nos.3 and 4.

9. In the same way the statement of accused No.4, as observed earlier was not required to be read

as substantive piece of evidence being a document not received in evidence by the Court. There is clear distinction between tendering of document in evidence and accepting the same as a piece of evidence. Technically, if the Court accepts that the unexhibited document, that is, statement of accused No.4 was not illegal then its evidentiary value established nil because it is not possible for the Court to say that the statement recorded was volunteered statement. In the same way knowing seizure of relevant document including the evidence that could have been collected from the Government Godown, that is, actual source from where the kerosene was being transported to the dealers and the licence holders. So this is a case where the genuine and reliable piece of evidence either collected by the Investigating Officer nor the same was produced during the course of trial. Presence of the accused with the stock, so also, the depositions of the Police Witnesses is accepted, which is not sufficient to link the accused with the crime. The proposition in the mind of the learned trial Judge is a risky proposition which would implicate any bona-fide

servant carrying the material on the instructions of his master or employer.

10. For the reasons aforesaid, the Court is of the view that this is a case where both the accused persons should be given the benefit of doubt observing that there is no sufficient evidence to hold that the accused Nos.3 and 4 had violated any clause of 1981 Control Order. Failure on part of the prosecution to keep the substratum story intact also goes against the prosecution and therefore on that count the accused could have been given the benefit of doubt. The finding recorded by the learned trial Judge is thus erroneous and such finding cannot sustain in the eye of law.

11. Thus the judgment and order of conviction and sentence dated 29th June, 1993 rendered by the learned Special Judge, Court NO.4, Ahmedabad in Special Criminal Case No.150 of 1992 is hereby quashed and set aside. The appellants are acquitted from the charges levelled against them. Fine, if paid by the appellants, are ordered to be refunded to

them on proper identification.

11.1 Bail Bond executed by the appellants-accused shall stand discharged. Order and Direction accordingly.

(C.K.BUCH, J.)

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